No. 22080

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT F. FREEDMAN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR THE APPELLANT.

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Errata.

On page 3 the Jurisdiction was inadvertently omitted.

Should read:

Jurisdiction.

The District Court had jurisdiction under Section 3231 of Title 18, and this Court has jurisdiction of the Appeal under 28 U.S.C. 1291, 1294(1) and Rule 37(a) of Federal Rules of Criminal Procedure.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

Cases — Page

Statutes

Textbooks

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BRIEF FOR THE APPELLANT.

Statement of the Case.

On December 15, 1966, the grand jury for the United States District Court, Central District of California, brought an indictment against the appellant, Robert F. Freedman, on two counts. The first count charged the co-defendant, Jack Vertlieb, with engaging in the business of accepting wages and failing to pay the occupational tax required by Title 26, United States Code, Sections 4411 and 4412, in violation of Title 26, United States Code, 7201, and charged the appellant, Robert F. Freedman, with aiding and abetting in this offense. The second count charged the same violation, but alleged that appellant was the principal, and Vertlieb, the aider and abettor.

Appellant plead not guilty, and thereafter moved to dismiss the indictment on grounds that the tax and registration requirements of Sections 4411 and 4412 of Title 26, were in violation of the Fifth Amendment to

the United States Constitution. This motion was denied on March 13, 1967.

On April 3, 1967, appellant stipulated to the facts of Count I of the indictment and was found guilty of that offense upon a court trial before the Honorable Jessie W. Curtis, United States District Judge. On June 5, 1967, appellant was sentenced to a term of three years imprisonment, execution of which was suspended, placed on three years probation, and was fined $1,000.00. Count II of the indictment was then dismissed upon motion by the government. Notice of Appeal was filed on June 5, 1967.

By stipulation filed with this court on August 21, 1967, counsel for the government and appellant's former counsel, in part stipulated, that

> "the sole issue to be raised on appeal is 4411 and 4412 of Title 26, United States Code, are invalid under the Fifth Amendment to the United States Constitution. . . ."

It was further stipulated that the present matter go off calendar pending determination of the *Grosso* and *Marchetti* cases. This Honorable Court extended the time for filing appellant's opening brief to December 15, 1967. On or about December 11, 1967, present counsel was substituted for appellant's former counsel, a stipulation requesting that

> "the appeal either go off calendar until the end of the next term of the Supreme Court, until the constitutional issue and question is decided, or until such time as the court may allow appellant's counsel to prepare and file an opening brief."

was filed. On December 18, 1967, this Honorable Court denied appellant's motion and extended the time

within which to file the opening brief until February 1, 1968.

Constitutional Provision and Statutes Involved.

This appeal involves the Fifth Amendment, United States Constitution; Title 26 U.S.C. §§ 4401 through 4423, 4901, 6011 and 7203.

Question Presented.

"Do not the federal wagering tax statutes here involved violate the petitioner's privilege against self-incrimination guaranteed by the Fifth Amendment? Should not this court, especially in view of its recent decision in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965), overrule *United States v. Kahriger,* 345 U.S. 22 (1953) and *Lewis v. United States,* 348 U.S. 419 (1955)?"

Summary.

The federal wagering tax laws are a well integrated series of statutes. They provide not only for registration and payment of a "special tax" prior to entering the business of gambling, but also for compulsory answers to questions concerning present and past behavior, criminal under the law of almost all states, later supplemental reporting highly incriminating in nature, and the exposing of books and records to the Internal Revenue Service.

The prior decisions of this Court, in *United States v. Kahriger,* 345 U.S. 22 (1953) and *Lewis v. United States,* 348 U.S. 419 (1955) looked almost solely to the condition precedent requirement of the special tax to the exclusion of the more obviously incriminating aspects of the legislation and Internal Revenue form. The

Court also defined the protection afforded by the privilege in an unduly restrictive manner.

The recent decision in *Albertson v. Subversive Activities Control Board,* 382 U.S. 70 (1965) virtually demands reversal here, and overruling of *Kahriger* and *Lewis.* Petitioner clearly has standing to raise the privilege without having filled out the registration form, as this area of regulation is one "permeated by criminal statutes." The approach of the *Albertson* Court in looking to the actual content of the registration form leads to the inescapable conclusion that compliance with 26 U.S.C. §§ 4411 and 4412 tends to incriminate the registrant concerning past conduct. Even if the plain language of the registration form is ignored, and registration is deemed totally prospective, required statements as to "future intent" would nonetheless tend to incriminate the taxpayer as to past acts.

The privilege, when disclosures are compelled in an area where all activity is criminal, should not be limited only to past acts. The *Kahriger* Court's reliance upon Wigmore in stating such a principle was misplaced. Such a rule, if exploited by cleverly drawn legislation, as is here before the Court, would lead to total emasculation of the privilege. For instance, there is no conceivable purpose served by the "condition precedent" aspect of this legislation other than subversion of the privilege—which has been singularly successful thus far.

There is no question that, even assuming existing law would be correct in a vacuum, it has in fact been used to convict people of criminal acts by use of information forced from them under threat of criminal sanction. Such a result represents an eroding away of the precious privilege; that erosion should continue no longer.

ARGUMENT.

I.

THE REGULATORY FRAMEWORK OF THE WAGERING TAX STATUTES.

Appellant presently stands convicted of having violated 26 U.S.C. Section 7201 as having "aided, abetted, counseled, induced and procured the commission of the offense alleged above." Count I of the indictment alleges that "while defendant (Jack Vertlieb, aka, Jack Burke) was so engaged, and by reason of such activity, the defendant was required by law to pay the occupational tax (wagering) as imposed by Sections 4411 and 4412, Title 26, United States Code, to the Director of Internal Revenue for the Los Angeles District, Los Angeles, California, and willfully attempted to evade and defeat the said tax and payment thereof in violation of United States Code, Title 26, Section 7201.

Although, in *United States v. Kahriger,* 345 U.S. 22 (1953), this Court upheld the wagering tax provisions against an argument that Congress had unconstitutionally used the taxing power to regulate conduct subject solely to state control, it was conceded that the taxes involved have "a regulatory effect" and doubtless act to "discourage or deter" gambling activity. 345 U.S. 22, at 28. To understand the impact of the wagering tax provisions upon the Fifth Amendment's privilege against self-incrimination, we must examine Chapter 35 as a single integrated unit, and view the individual statutory provisions taking into consideration their relationship with each other.

Section 4401 of Title 26 imposes an excise tax of 10 percent on all wagers (save for certain betting transactions exempted by 4402) which tax must be paid by

"each person who is engaged in the business of accepting wagers" and by "each person who conducts any wagering pool or lottery". In addition to the excise tax on the actual wagers, Section 4411 imposes a "special tax of $50.00 per year to be paid by each person who is liable for tax under Section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable". The special tax must be paid before the gambler goes into business. 26 U.S.C. §4901. Hand in hand with the "special tax" is the registration provision of 4412 requiring any person liable to pay the $50.00 also to provide the Internal Revenue Service with certain details of his "operations". Section 4412 has been implemented by Internal Revenue Service Form 11-C, Special Tax Return and Application for Registry, which, after demanding an answer to the query, "Are you engaged in the business of accepting wagers on your own account?", continues to elicit detailed information as to the people with whom the taxpayer-registrant is doing business [R. 7].[1]

Section 6011 of Title 26 supplies to the Secretary of the Treasury, or his delegate, the authority to require of any taxpayer, "return[s] or statement[s] according to forms and regulations prescribed" by them. Form 11-C has been so prescribed by the I.R.S. and, in addition to

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[1]See *United States v. Whiting,* 311 F. 2d 191 (4 Cir. 1962) where the I.R.S. refused to issue an "occupational tax stamp" when the taxpayer tendered the $50.00 "special tax" but failed to execute a registration statement, and *United States v. Mungiole,* 233 F. 2d 205 (3 Cir. 1956) where a tender of the tax, without registration, was held to be no defense to a subsequent prosecution for failing to pay the tax.

the original registration form, the "taxpayer" must, *within 10 days after starting to do business* with a new employee or employer, file a "Supplemental" Form 11-C reporting that information. 26 C.F.R. §44.4412-1.

The *active* registration requirements of Chapter 35 far from exhaust its self-incriminating potential; Section 4423 decrees that "the books of account of any person liable for (wagering) tax . . . may be examined and inspected as frequently as may be needful to the enforcement of this chapter". It is clear that, in addition to using information obtained for the purpose of enforcing the tax, the I.R.S. feels it proper and desirable to turn over the same information to local and state law enforcement officials so that the "taxpayer" might be duly convicted on state gambling charges—it has proudly trumpeted that fact. Caplan, The Gambling Business and Federal Taxes, Journal of Crime and Delinquency, Vol. 8 (1962) pg. 697. Against this backdrop of "friendly cooperation", Chapter 35 is then neatly rounded out by Section 4422, in which Congress specifically provides that payment of the wagering tax "shall not exempt any person from any penalty provided by a law of the United States or of any state for engaging in the same activity . . ."

This court, more than a decade ago, in *United States v. Kahriger, supra* and *Lewis v. United States,* 348 U.S. 419 (1955), held that the foregoing statutory scheme was not violative of the privilege against self-incrimination; we ask the Court now to reconsider those holdings.

II.

KAHRIGER AND LEWIS REVISITED.

A challenge to the constitutionality of the wagering tax provisions was first brought before this Court in *United States v. Kahriger,* 345 U.S. 22 (1953). There, the major portion of the Court's opinion dealt with defendant's contention that the legislation was not a true exercise of the Congressional taxing power, but rather an illegal attempt to penalize intrastate gambling activity, the regulation of which had been constitutionally left solely to the states. When the Court did pass on to the Fifth Amendment challenge, it disposed of it rather summarily.

First, the majority expressed doubt that the accused had standing to raise the self-incrimination argument. Citing the following language from *United States v. Sullivan,* 274 U.S. 259, at 263, "If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all", the Court commented that, in view of the failure of the accused to register at all, "it is difficult to see how he can now *claim the privilege*". 345 U.S. at page 32. (Emphasis added).

The Court continued, without specifically holding that defendant lacked standing to raise the self-incrimination issue, to dispose of the claim on the merits. The majority, in this regard, stated very briefly,

> "Under the registration provisions of the wagering tax, appellee is not compelled to confess to acts already committed, he is merely informed by the statute that in order to engage in the business of wagering in the future he must fulfill certain conditions." 345 U.S. at pages 32-3 (Emphasis added).

Two years after *Kahriger,* in *Lewis v. United States,* 348 U.S. 419 (1955), the Court expanded somewhat on its cryptic holding, in *Kahriger,* that a registrant need not "confess" to any crimes—only "fulfill certain conditions" before engaging in wagering. Reading Sections 3271 and 3290[2] of the 1939 Internal Revenue Code in tandem, the Court stated, "it seems clear that payment of the special $50 tax is to be made prior to engaging in the business of accepting wagers." 348 U.S. at page 421.

The Court pointedly stressed the word *compelled* in its definition of the scope of the Fifth Amendment guarantee. 348 U.S. at page 421. Expanding upon that theme, the majority went on to state that the fact that a gambler "may elect to pay the tax *and make the prescribed disclosures required by the Act* is a matter of his choice. There is nothing compulsory about it, and, consequently, there is nothing violative of the Fifth Amendment. . . . The only compulsion under the Act is that requiring the decision which would-be gamblers must make at the threshold. They may have to give up gambling, but there is no constitutional right to gamble." 348 U.S. at page 422.

Passing on, finally, to appellant's claim that the purchase and required exhibition of the $50 stamp could furnish probable cause for issuance of a search warrant and thereby incriminate him, the Court, without citation of authority, curtly dismissed that contention based upon Lewis' very failure to purchase the stamp and register. "His complaint is that if he had one he

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[2]Sections 4401 and 4901 of the 1954 Code. Section 4901 presently lays out even more specifically than its 1939 precursor the "condition precedent" aspect of the special tax provision.

might get in trouble. Since petitioner is without a stamp, he is not in a position to raise the question as to what might happen to him if he had one." 348 U.S. at page 423.

In summary, the federal wagering tax laws, as preserved from constitutional attack in *Kahriger* and *Lewis,* have stood for a decade and a half on these underpinnings:[3]

1. The Court's holding that an accused, not having purchased a stamp or registered, cannot, in his criminal prosecution therefor "claim the privilege" or point to what might have happened had he complied with the law.

2. The Court's emphasis on the word "compelled" in the Fifth Amendment, and its holding that payment of the tax, the prescribed registration and disclosures are strictly "a matter of . . . choice with nothing compulsory about it". 348 U.S. at page 422.

3. An implication somehow based presumably upon the literal language of the Fifth Amendment, that only *testimonial* compulsion would be violative of the privilege.

4. The holding that, because present section 26 U.S.C. 4901 requires payment of the special tax *before* entering the "business of accepting wagers",

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[3]In *Kahriger,* the Court was not completely clear as to whether it was considering alleged self-incrimination under State or other federal laws. The government, however, argued that any possible incrimination would solely be under state law, *United States v. Lewis,* 348 U.S. 419, 423, fn. 1, and therefore not protected by the Fifth Amendment. *United States v. Murdock,* 284 U.S. 141 (1931). To whatever extent *Murdock* was an implied basis for the *Kahriger* holding, this Court's decision in *Murphy v. Waterfront Commission,* 378 U.S. 52 (1964) has undercut it.

all that is required by Chapter 35 is the disclosure of present intent to break the law, in the future, which disclosure, even if "compelled", cannot be deemed incriminating.

We contend that *Kahriger* and *Lewis,* even when decided, were based on an unduly restricted view of the privilege which this Court has called "an important advance in the development of our liberty—'one of the great landmarks in man's struggle to make himself civilized'."[4] *Ullman v. United States,* 350 U.S. 422, 426 (1956). In its decisions of the last decade, however, this Court has made it clear that if the wagering tax statutes "would not violate the Fifth Amendment's privilege against self-incrimination, it is hard to think of anything that would". *United States v. Lewis,* 348 U.S. at page 425 (Black, *J.,* dissenting).

III.

THE WAGERING TAX STATUTES VIOLATE THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION.

A. Appellant Here Has Standing to Raise the Privilege.

Relying upon *United States v. Sullivan,* 274 U.S. 259 (1927), the Court in *Kahriger* intimated that one accused of criminally having failed to register and pay the special wagering tax could not then "claim the privilege" because of his very failure to comply with the tax and registration requirements; later, in *Lewis,* the Court squarely held that petitioner could not complain of the alleged self-incriminating effects of the legislation because he had, in fact, failed to comply,

[4]Griswold, The Fifth Amendment Today (1955), 7.

Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965) has now, however, completely undercut the "no standing" rationale of the earlier wagering tax cases.

In voiding the registration provisions of the Subversive Activities Control Act of 1950, the Court squarely met, and disposed of, the government claim, based upon *Sullivan,* that petitioners lacked standing because of their failure to register and invoke the privilege on those specific questions claimed to be incriminating. The Court pointed out that while "In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large . . . here they are directed at a highly selective group inherently suspect of criminal activities." The claims of privilege in *Albertson*, unlike *Sullivan*, were "not asserted in an essentially non-criminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioner in the admission of a crucial element of a crime." 382 U.S. at page 79.

The instant case is clearly governed by *Albertson* rather than *Sullivan.* An answer to virtually any one of the questions on I.R.S. Form 11-C [R. 7] would involve an "admission of a crucial element of a crime". Even payment of the special tax without registration at all, if that could legally be accomplished, might easily be used to incriminate, especially in a conspiracy prosecution. Surely appellant must have the same standing to challenge the validity of the wagering tax statutes, without first confessing to a crime, as did the alleged Communist Party members in *Albertson. Cf. Jones v. United States,* 362 U.S. 257, 258-267 (1960).

B. The Wagering Tax Provisions Violate the Fifth Amendment Privilege Notwithstanding the Statutory Requirement That the Special Tax Be Paid Before Entering Into the Business of Accepting Wagers.

In both *Kahriger* and *Lewis,* the Court leaned heavily on the fact that Sections 3290 and 3271 of the 1939 Code required payment of the special $50 tax before venturing into the business of accepting wagers. Centering solely upon this single aspect of the entire group of wagering tax statutes, combined with the brief statement in *Kahriger* that the privilege applied "only to past acts, not to future acts that may or may not be committed", 345 U.S. at page 32, led the court to the conclusion that the privilege had not been violated—that perhaps the "would be gambler . . . may have to give up gambling, but there is no constitutional right to gamble". *United States v. Lewis, supra,* at 422; see also dissent of Mr. Justice Black at page 425. We submit that all the Court's premises in the earlier cases —(1) the single minded preoccupation with the condition precedent aspect of the special tax; (2) the conclusion that the payment and registration *must* only relate to future conduct; and (3) the "rule of law" that the privilege *necessarily applies only to past acts*— were wrong.

1. In Measuring the Constitutional Validity of the Wagering Tax Provisions the Court Must Look to the Entire Statutory Scheme.

A reading of *Kahriger* and *Lewis* would almost leave one with the impression that the *only* thing a prospective "taxpayer" need do, under the wagering tax provisions, is pay the special tax of $50 before starting

his "business". That of course is not at all what this package of legislation provides. Payment of the special tax is only the first requirement in a compulsory series of steps demanding that the citizens furnish the sovereign with information with which the sovereign may incriminate and incarcerate the citizen. These statutory and regulatory demands are set forth in detail, *supra,* and little would be served by repeating them here. It is a virtual impossibility, however, for a taxpayer to comply with all the statutory requirements without incriminating himself—as to past and present behavior.[5]

To look only to the special tax provision is to ignore the real violence done to the Fifth Amendment right by the entire legislation. As with the Subversive Activities Control Act, there is nothing in this "Act or regulation (which) permits less than literal and full compliance with the requirements of the form" or other disclosure provisions. *Albertson v. Subversive Activities Control Board,* 382 U.S. at 78. The Internal Revenue Service considers the special tax payment and the completion of Form 11-C as inseparable. In *United States v. Mungiole,* 233 F. 2d 205 (3 Cir. 1956), the accused had tendered the $50 which was refused because, relying upon the privilege, he had refused to register. His subsequent conviction for accepting wagers without payment of the tax was affirmed by the Third Circuit, which held that tender of the tax, without registration,

[5]Where a registration statute calls for information which would be incriminating as to present status or past conduct, the lower courts have had no difficulty with "standing"—and have dismissed prosecutions brought for failure to register. *Russsell v. United States,* 306 F. 2d 402 (9 Cir. 1962); *Dugan v. United States,* 341 F. 2d 85 (7 Cir. 1965); *United States v. Fleish,* 227 F. Supp. 967 (E.D. Mich. 1964).

was ineffective. *Cf. United States v. Whiting,* 211 F. 2d 191 (4 Cir. 1962).

Further, if the cases dealing with the testimonial privilege are a valid guide, the payment of the tax would probably be deemed a waiver of the privilege, *Caminetti v. United States,* 242 U.S. 470, 492-5 (1917), *Raffel v. United States,* 271 U.S. 494 (1926), *Rogers v. United States,* 340 U.S. 367 (1951), thereby demanding total compliance, the privilege no longer being available, with registration under 4412, with the "open book" provision of 4423 and with the subsequent reporting required by 26 C.F.R. §44.4412-1(b) (2) and (3).

Although concededly *Albertson* dealt with compelled disclosures which could more clearly incriminate as to past acts, the approach of the court in looking to the *entire* legislation, along with forms issued pursuant to the regulations, leads us here to the same conclusion—the taxpayer-registrant is compelled by threat of criminal sanction to disclose that which inevitably would tend to incriminate him.

2. However Prospectively Interpreted, Payment of the Special Tax and Registration May Tend to Incriminate the Taxpayer as to Past Acts.

We here assume, for purpose of argument, that, in measuring the wagering tax provisions against the yardstick of the Fifth Amendment privilege, it is valid, notwithstanding the clear language of the registration form and Tax Return, to consider the wagering tax requirements purely prospective.[6] Even if that is done,

[6]Although *Kahriger* and *Lewis* seemed to ignore the registration provision, or at least the registration form, it has been held

(This footnote is continued on the next page)

that requirement, coupled with the criminal penalty of 26 U.S.C. 7203 for wilful failure to comply, violates the privilege against self-incrimination.

One of the most striking things about both the *Kahriger* and *Lewis* decisions is the Court's total failure to explain away some of our more significant Fifth Amendment decisions, *Counselman v. Hitchcock,* 140 U.S. 547, 564 (1892), *Blau v. United States,* 341 U.S. 159 (1950), *Hoffman v. United States,* 341 U.S. 479 (1951). In those cases, the Court clearly held that the privilege extends not only to situations where an answer in itself could support a conviction, "but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[7] *Hoffman v. United States,* 341 U.S. at 486. The test there established concerning the validity of the claim of privilege was that "it need only be evident from the implications of the questions, in the setting in which it is asked, that a responsive answer or an explanation of why it cannot be answered *might* be dangerous because injurious disclosure *could* result". 341 U.S. at pages 485-6. Since *Hoffman,* the court has further defined this test. *Albertson* now clearly indicates that the "link-in-the-chain" test applies not only to disclosures evidentiary in themselves, but also to those things which might "at least supply investigatory ing inquiry into crime, including gambling"—a fair

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that registration also is totally "prospective". *United States v. Cefalu,* 338 F. 2d 582 (7 Cir. 1964). That is difficult to reconcile with Form 11-C and the questions therein, *e.g. "Are* you engaged in the business . . ." etc. At any rate, registration here *inevitably* leads to incrimination under the Supplementary Registration and disclosure provisions. 26 U.S.C. Sec. 4423; 26 C.F.R. §44.4412-1.

[7] *Murphy v. Waterfront Commission, supra,* has of course extended that protection to state crimes.

leads to a criminal prosecution", 382 U.S. at page 78, while in *Malloy v. Hogan,* 378 U.S. 1, 13, the Court heavily weighed, as part of the "setting", the fact that the grand jury interrogation was part of a "wide ranging inquiry into crime, including gambling"—a fair characterization, we think, of the Kefauver Committee "investigation" which gave birth to the legislation now in question. *Malloy* further emphasized that the privilege must be upheld unless it is " ' "*perfectly clear* . . . that the answer(s) *cannot possibly* have such tendency" to incriminate.' " 378 U.S. at 12.

We are here dealing with a "tax" on a business which is carried on in an area "permeated with criminal statutes"—where the government clearly seeks incriminating information *at least* as much as revenue—and where, under *Albertson, Malloy* and *Hoffman* every reasonable presumption in favor of the privilege's applicability should be entertained.

One possibly incriminating effect, as to past conduct, of the purchase of the stamp comes immediately to mind—even if we consider the annual $50 special tax wholly prospective in nature. First, the *Kahriger* court's view of the bookmaking "business" as something entered into at a specific instant in time, after due deliberation, much as a corporation "goes public", is not true to life or experience. A man quite often may drift into bookmaking, either by way of having been a "runner" or by virtue of having, over a period of time, increased his activity from single shot or social betting to a volume which merits a "business" label. Although, in both instances he would not previously have been liable for payment of the federal tax, *United States v. Calamaro,* 354 U.S. 351 (1957), *Kahn v.*

United States, 251 F. 2d 160 (9 Cir. 1958), *United States v. Simon,* 241 F. 2d 308 (7 Cir. 1957), *George v. United States,* 346 F. 2d 137 (9 Cir. 1965), he doubtless had been violating state gambling laws. At the instant he becomes liable for the tax, or when he first becomes aware of the liability, he is faced with the choice of committing a federal crime by wilfully failing to pay the tax or of supplying investigatory leads which might result in conviction for his past activity in violation of state law.

State conspiracy statutes present even greater likelihood that compliance with the requirements of 4411 and 4412, however prospectively interpreted, will incriminate the taxpayer-registrant. The necessary listing of associates, even assuming Form 11-C's "Are you engaged . . ." and "Do you receive . . ." are translated somehow into the future tense, surely supports an inference that the taxpayer has *already agreed,* with those listed, to violate state law.[8] Since the payment of the tax, under federal law, is a condition precedent to actually going into business, payment and registration supply overt acts, thereby making the conspiracy offense complete. The overt acts, of course, need not be successful toward accomplishing the object of the conspiracy, *State v. Devine,* 149 Conn. 640, 649, 183 A. 2d 612, 616 (1962), and need not be criminal acts in themselves. *United States v. Rabinowich,* 238 U.S. 78, 86 (1915). The compulsory tax and registration does more than

[8]One court has held, in affirming a conspiracy conviction based upon the wagering tax stamp, "It will not be gainsaid that common sense dictates the conclusion that these parties would not have gone to the trouble and expense complying with this federal law unless they fully intended to engage in the activity of which the tax was levied and paid." *Acklen v. Tennessee,* 267 S.W. 2d 101, 104 (Tenn. 1954).

tend to incriminate the registrant—*it can convict him, of prior criminal acts, without any other evidence.* At least one state court has so held. *Acklen v. Tennessee,* 267 S.W. 2d 101 (Tenn. 1954).

3. **Where Disclosures Are Compelled in an Area in Which the Specific Endeavor Is Illegal, the Privilege Should Apply Whether Registration Is Required Before or After the Criminal Act.**

The heart of the *Kahriger* opinion is the Court's flat statement, relying only upon Professor Wigmore,[9] that the privilege relates "only to past acts, not to future acts that may or may not be committed". 345 U.S. at 32. We submit that nothing in Wigmore nor in the cases he relied upon justifies the application of the usual "record keeping" rules to the legislation here challenged; further, application of the *Kahriger* generalization "would permit the destruction of the privilege in all or almost all situations by ingeniously drawn legislation".[10] Morgan, The Privilege Against Self-Incrimination, 34 Minn. L. Rev. 1 (1949).

The source, in Wigmore, of the Court's flat generalization concerning past and future acts is the Professor's discussion of statutes requiring certain records to

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[9]8 Wigmore (3d Ed., 1940), § 2259(c).

[10]"Under the *Kahriger* rationale, the potential role of required information in the area of criminal prosecution appears almost unlimited. Assume, for example, the fancified possibility of an excise tax laid on the occupation of burglary, coupled with a registration statement requiring disclosure of the principle place of business—that is, where tools are kept and goods received or stored. These statements relating to future intent could, consistently with the *Kahriger* decision, provide prosecutors with a file of 'non-incriminatory' confessions between the fact which would be admissible into evidence at trial."

65 Colum. L. Rev. 681, 689, Required Information and The Privilege Against Self Incrimination (1965).

be kept. The examples used were the "druggist's report of liquor sales, or a pawnbroker's record of pledges", 8 Wigmore at page 349, both *legal businesses.* It is clear that Wigmore's feeling that the privilege was inapplicable was largely based upon the legality of the "generic class of acts", 8 Wigmore at page 349, where "it is certain that only an occasional one will involve criminality". 8 Wigmore at page 352. Wigmore's "rule" would appear only to apply to legislation *"which merely requires beforehand a future report on a class of future acts among which a particular one may or may not in the future be criminal . . ."* 8 Wigmore at page 349 (Emphasis in source).

Unlike the druggist and the pawnbroker, *all* of a gambler's business is illegal—at least in Connecticut. Any and all further acts will necessarily be criminal. Any compelled disclosure will incriminate. In a setting such as this one, the rules governing pawnbrokers are totally inapposite.

Of great significance here is the reason, or lack thereof, for the requirement of prior payment and registration. This clearly is not a licensing statute where the government, as with I.C.C. franchises, seeks to regulate the number of licensees or the areas in which they work—nor, like most state liquor licensing schemes, is the sovereign attempting to maintain minimum standards in its liquor outlets and permittees. Here, you simply pay the $50 tax, register, and receive your stamp —there are no other requirements for entering the business. The condition precedent requirement was either a Congressional accident, totally unrelated to the stated legislative purpose of raising revenue, or, much more likely, a deliberate attempt to subvert the privilege

against self-incrimination.[11] To grant success to the sovereign by use of such a gimmick hardly maintains a "fair-state-individual balance". *Miranda v. Arizona,* 384 U.S. 436, 460 (1966). Just as *Albertson* drew a meaningful distinction, where the privilege was concerned, between completion of the basically innocuous federal income tax return and the registration forms for Communists, here too we must differentiate between druggists and gamblers.

C. Kahriger and Lewis Run Counter to Our Basic Sense of Justice Embodied in the Fifth Amendment Privilege.

In more than a century and a half of constitutional interpretation, this Court, in its decisions defining the reach of the Fifth Amendment privilege against self-incrimination, has "groped for the proper scope of governmental power over the citizen". *Miranda v. Arizona,* 384 U.S. 436, 460 (1966). As compulsion of one set or another by the sovereign has manifested itself in increasingly sophisticated forms the privilege, reflecting "our most noble aspirations", *Murphy v. Waterfront Commission,* 378 U.S. at 55, has blossomed forth as a protection against "subtle encroachments on individual liberty". *Miranda v. Arizona,* 384 U.S. at 460. While the Court's defining of the privilege "as broad[ly] as the mischief against which it seeks to guard", *Counselman v. Hitchcock,* 142 U.S. 547, 562, has perhaps been most dramatic in the confession cases,[12] there

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[11]Professor Morgan's "ingeniously drawn legislation", 34 Minn. L. Rev. 1 (1949).

[12]*Brown v. Mississippi,* 297 U.S. 278 (1936); *Chambers v. Florida,* 309 U.S. 227 (1940); *Haynes v. Washington,* 373 U.S. 503 (1963); *Escobedo v. Illinois,* 378 U.S. 478 (1964); *Miranda v. Arizona,* 384 U.S. 436 (1966).

have been other "subtle encroachments" which have recently been met.

One of the most important of these was the discarding of the so-called "dual sovereignty" rule of *United States v. Murdock, supra, Knapp v. Schweitzer,* 357 U.S. 371 (1958), and *Feldman v. United States,* 322 U.S. 487 (1944). In *Murphy v. Waterfront Commission, supra,* pointing to the inherent unfairness of an accused being "whipsawed" into incriminating himself under state or federal law, especially "in our age of 'cooperative federalism' ", the Court held that answers compelled in a state investigation might not be used in connection with a federal prosecution. 322 U.S. at 55-6, 79-80.

Murphy, however, has not totally done away with the "whipsaw". That registration and payment of the gambling tax not only incriminates, but is fully intended by the sovereign to incriminate, is amply demonstrated by the following statement of Mortimer M. Caplan, former Commissioner of Internal Revenue, writing in 1962 for the *Journal of Crime and Delinquency,* Vol. 8, in an article titled *The Gambling Business and Federal Taxes:*

> "The enforcement of local anti-gambling laws is a function of police powers reserved to the states by the Tenth Amendment. However, the Federal government can assist these local agencies to enforce such laws more effectively in a number of ways. Supplying information that is helpful to local law-enforcement is one very important aid. *As an example, the Internal Revenue Service makes available to those agencies the names and addresses of those who have paid wagering taxes.*
>
> . . .

> The District Director of Internal Revenue is required by law to maintain for public inspection an alphabetical listing of the names of all persons who have paid certain "special taxes". This includes both the excise and the occupational taxes on wagering.
>
> *The dilemma of the bookmaker is apparent. If he registers and pays the wagering taxes, he is generating evidence of his gambling activities—evidence that is available to local authorities. If he does not register, he exposes himself to the sanctions and penalties contained in the Federal Wagering tax laws."* page 697 (Emphasis added).

"Non-incriminatory" registration disclosures compelled by threat of criminal prosecution have been and are being used to obtain convictions for other criminal offenses, both state and federal, *Irvine v. California,* 347 U.S. 128 (1954); *State v. Curry,* 92 Ohio App. 1, 109 N.E. 2d 298 (1952); *Commonwealth v. Fiorini,* 202 Pa. Super. 88, 195 A. 2d 119 (1963); *Acklen v. Tennessee,* 267 S.W. 2d 101 (Tenn. 1963); *State v. Mills,* 229 La. 758, 86 So. 2d 895 (1956); *United States v. Zizzo,* 338 F. 2d 577 (7 Cir. 1964).

Regardless of whether, technically, this legislation looks to the past or future, it would be difficult to explain to someone convicted through use of his own registration statement that he had not been "compelled" to bear witness against himself.[13] A result similar to that reached in *Kahriger* and *Lewis* may be duplicated

[13]The literal use of "compelled" by the Court in *Lewis* is unjustified. In *Griffin v. California,* 380 U.S. 609 (1965), it was held that the making of the "assertion [of the privilege] costly", was an unconstitutional "compelling" proscribed by the Fifth Amendment.

by legislatures at will by use of what is essentially a "gimmick" of legislation. The privilege should surely rise higher than congressional ingenuity; if it does not, we are all in trouble.

It must appear obvious that in the event the appellant, Freedman, is required to register, such registration would serve as an incriminating admission of gambling activities. And in this connection we quote from the Honorable James R. Browning, Circuit Judge, Ninth Circuit, in the case of *United States of America v. Carl Cohen,* decided December 19, 1967, in which a judgment of the United States District Court for the District of Nevada was affirmed, quashing a Summons. Judge Browning, in part, held as follows:

The Fifth Amendment commands that "no person shall be compelled to be a witness against himself." It is obvious that the government seeks to compel Cohen to produce the described documents without regard to his wishes. It has been the law for at least eighty years that compelled production of documents falls within the ambit of privilege. It is conceded that the documents here might be used by the government against Cohen in a future criminal proceeding. Moreover, since the documents themselves are incriminating, their very production pursuant to their description in the summons would constitute an incriminating admission of their identity and authenticity. Clearly, recognition of the privilege in this case would clearly serve most of the purposes of the privilege, recently restated in *Murphy v. Waterfront Comm'n,* 378 U.S. 52, 55 (1964:

It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel dilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates "a fair state-individual balance by requiring the government to shoulder the entire load," . . . our respect for the inviolability of the human personality and of the right of each individual" to a private enclave where he may lead a private life ". . . our distrust of self-deprecatory statements, and our realization that the privilege, while sometimes "a shelter to the guilty" is often "a protection for the innocent."

Conclusion.

This Court has been scrupulous in protecting the citizen from governmental overreaching destructive of a "fair state-individual balance" in the criminal process; always, especially in recent years, has it jealously guarded from erosion—by legislature, judge, prosecutor or policeman—the Fifth Amendment privilege against self-incrimination, "the essential mainstay of our adversary system". *Miranda v. Arizona,* 384 U.S. at 460. The decisions in *Kahriger* and *Lewis* stand out strikingly, in the recent history of the Court, as exceptions both in their narrow unrealistic approach to the legislation in question and in the restrictive scope there accorded the privilege. We ask the Court now to over-

rule both cases and to recognize the real violence done the privilege by the wagering tax. We ask that the judgment below be reversed and the indictment ordered dismissed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM M. SARNOFF